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Fifteenth plenary meeting

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FIFTEENTH PLENARY MEETING

Wednesday, 7 May 1969, at 3.15 p.m.

President: Mr. AGO (Italy)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

Article 34 (Rules set forth in a treaty becoming binding on third States as rules of general international law) *(continued)*

1. Mr. CARMONA (Venezuela) said that, at the first session, both his delegation and that of Finland had submitted separate amendments for the deletion of article 34. Venezuela had done so because it contended that customary law was too vague a source of international law to be generally acceptable.

2. The question of customary law had been considered by the Permanent Court of International Justice in the *Lotus* case [1] and by the International Court of Justice in the *Asylum* case [2] and the *North Sea Continental Shelf* cases.[3] In all three it had been decided that there was no customary law which could be invoked. In paragraph 63 of its judgement in the *North Sea Continental Shelf* Cases, the Court had stated:

> . . . it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure among those in respect of which a right of unilateral reservation is not conferred, or is excluded . . .[4]

3. The Court had thus defined customary law a *jus cogens*. Accordingly only a peremptory norm of international law, or *jus cogens*, could become customary law. In that case no State would be free to enter a reservation to what was deemed to constitute customary law. If *jus cogens* and customary law were one and the same thing, then article 34 had no point since *jus cogens* was already covered by article 50. The two articles would either conflict or overlap. If, on the other hand, customary law was not *jus cogens*, then article 34 imposed upon States, against their will, a doubtful formula accepted by some, as in the *North Sea Continental Shelf* cases, and rejected by others. Venezuela could not accept a formula of that kind and could only agree to be bound by the rules of customary law that were acceptable to it as such. No customary law could be imposed on a State against its will. That had been made clear by the International Court of Justice in the proviso which concluded the first sentence of paragraph 73 of its judgement in the *North Sea Continental Shelf* cases. That sentence read: " With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected ".[5]

4. The Venezuelan delegation would accordingly vote for the deletion of article 34. If the Conference decided that the article should be retained, Venezuela would vote for the United Kingdom amendment (A/CONF.39/L.23).

5. Mr. BARILE (Italy) said that his delegation had carefully examined the various proposals submitted in connexion with article 34. It was unable to support the United Kingdom amendment because it was inconsistent with the spirit of article 34. That article envisaged the case where a rule incorporated in a treaty might constitute an historical event which could have such an impact on the legal conscience of the international community as to produce a new customary rule of the same or of similar content, which would be binding as a customary rule on all States. The other proposals to amend the article were in contradiction with the broad formula set out in Article 38 of the Statute of the International Court of Justice, which merely referred to international custom as evidence of a general practice.

6. The Italian delegation would therefore vote in favour of article 34 in its present form.

7. Mr. VALENCIA-RODRIGUEZ (Ecuador) said that article 34 expressed an essential rule of international law and was framed as an exception to the maxim underlying articles 30 to 33, *pacta tertiis nec nocent nec prosunt*. The International Law Commission had made it clear in paragraph (2) of its commentary to article 34 that its provisions related to " cases where, without establishing any treaty relation between themselves and the parties to the treaty, other States recognize rules formulated in a treaty as binding customary law " and that " the source of the binding force of the rules is custom, not the treaty ".

8. Custom had been recognized as a source of international law by even the earliest writers. To be binding, it must satisfy two requirements; there must be evidence of prolonged and continuous repetition of the same acts, and there must be evidence that the acts in question represented the performance of an obligation or the exercise of a right, as the case might be. Those

[1] *P.C.I.J.*, Series A, No. 10.

[2] *I.C.J. Reports, 1950*, p. 125.

[3] *I.C.J. Reports, 1969*, p. 3.

[4] *Ibid.*, pp. 38 and 39.

[5] *Ibid.*, p. 42.

two requirements were to be found in Article 38, paragraph 1 (*b*), of the Statute of the International Court, which referred to international custom " as evidence of a general practice accepted as law ". It could thus be claimed that the " customary rule of international law " to which article 34 referred must satisfy four criteria: it must be of long standing, it must be applied in a uniform manner, it must reflect a general practice, and the practice must be " accepted as law ". That fourth criterion was especially important, since it meant that custom depended ultimately on the consent of States.

9. The enumeration of the sources of international law contained in Article 38, paragraph 1, of the Statute of the Court did not establish any hierarchy among those sources. In fact, custom could be said to have once been the only source of binding rules of international law. Later, certain rules originally embodied in general multilateral conventions had become established rules of customary international law, having satisfied with the passage of time the four criteria to which he had referred. There was thus a continuous interaction between treaty law and customary law. To take just two examples, the abolition of privateering by the Treaty of Paris of 1856 [6] and the outlawing of war as an instrument of national policy by the Briand-Kellogg Pact of 1928 [7] had later become rules of customary international law. The rules in the future convention on the law of treaties might well come to be accepted in due course by States — whether or not parties to it — as rules of customary law to be applied to all treaties, even those concluded before it came into force.

10. For those reasons, his delegation would vote in favour of article 34 as it stood and would oppose the United Kingdom amendment (A/CONF.39/L.23). The wording of that amendment had been taken from article 3 and had already been used elsewhere in the convention in an attempt to deal with another problem. The formula was obviously being overworked. Its language was in fact totally unsuited to article 34, where it would detract from the clarity of the provisions of the article by making their meaning dependent on the interpretation of such broad expressions as " so far as that rule would be binding " and " in accordance with international law ".

11. If there were a desire to broaden the scope of article 34 so as to cover in addition sources of international law other than custom, his delegation would not oppose it, but it would then suggest that the words " customary rule " be replaced by the words " general rule " and that the amendment by Nepal (A/CONF.39/L.27) be incorporated, so that the article would then read: " Nothing in articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a general rule of international law ".

12. His delegation did not wish to make any formal proposal to that effect but merely put forward the idea as a suggestion for the Conference.

13. Mr. PASZKOWSKI (Poland) said that his delegation maintained the position it had taken at the first session of the Conference with respect to article 34. The article contained an indispensable provision which completed the section dealing with the position of third States with regard to rules formulated in a treaty. There would be a serious gap in the section and in the convention as a whole if such a provision were not included. The provision would make it impossible for a State to invoke its non-participation in a treaty as an excuse to evade the application of rules which were binding upon it as customary rules. Article 34 should be retained in the convention for that reason alone.

14. His delegation's understanding of the scope of article 34 was that a treaty concluded between certain States did not create either obligations or rights for a third State without its consent. There were, however, situations in which the binding force of rules formulated in a treaty extended beyond the contracting States. Rules formulated in a treaty concluded between certain States might subsequently become binding upon other States by way of custom. On the other hand, there were treaties which purported to state existing rules of customary law. Such rules were binding upon third States whether they were parties to the treaty or not. In such cases the real source of obligations for third States was customary law and not the treaty.

15. Article 34 might be redrafted in order to make it quite clear that it covered the two situations he had mentioned. All that was required was to substitute the word " being " for the word " becoming ".

16. His delegation supported the amendment by Mongolia (A/CONF.39/L.20), which provided a useful clarification.

17. Mr. MATINE-DAFTARY (Iran) said he agreed with the representatives of El Salvador and Venezuela that article 34 was unnecessary. He regretted that the proposal to delete it had not been adopted at the first session of the Conference. Article 38 of the Statute of the International Court of Justice covered much more clearly the point with which article 34 was concerned.

18. While the amendments submitted by Nepal (A/CONF.39/L.27) and the United Kingdom (A/CONF.39/L.23) were generally acceptable, he would rather see the article dropped from the convention altogether and would support any proposal to that effect.

19. Mr. MOLINA ORANTES (Guatemala) said that, at the first session, considerable opposition had been voiced to article 34. The discussion, however, had not removed the ambiguity of the provisions of that article, which lent themselves to two possible interpretations.

20. The first was that article 34 stated the rule that customary international law was binding all States, even if they had not expressly recognized it by treaty; the second was that it was an accepted principle of international law that a rule embodied in a treaty between two or more States could be invoked against a third

[6] *British and Foreign State Papers,* vol. XLVI, p. 26.

[7] General Treaty for Renunciation of War as an Instrument of National Policy: League of Nations, *Treaty Series,* vol. XCIV, p. 57.

State as a binding rule of law, on the grounds that treaty law provided indisputable evidence of the existence of a specific rule of customary law.

21. That doctrine had been put forward by some writers in connexion with the law on the utilization of international waterways; it had been claimed that repetition of a rule in a number of treaties provided evidence or proof of international practice which had all the material and psychological elements of a rule of customary law. That doctrine could lead to such claims as that to extend the application of the many conventions on diplomatic asylum which had been concluded by the Latin American countries to States in other continents which did not recognize that institution. It might also be invoked to assert as a rule of customary law applicable to third States a provision in a treaty between a number of countries which laid down three miles as the breadth of the territorial sea. If such were the interpretation to be placed on article 34, his delegation would strongly oppose it.

22. If, however, article 34 were to be given the first interpretation, its provisions would be superfluous. They would, moreover, fall outside the purposes of the convention on the law of treaties, which had been rightly termed a treaty on treaties, because its essential purpose was to codify the law applicable to agreements between States. It was true that in the case of some of the articles, the convention dealt with matters beyond the scope of the law of treaties, but in fact the articles in question merely reaffirmed unwritten rules which had for many centuries governed relations between States.

23. The reference to customary law in article 34 was both unnecessary and ill-advised. Although customary international law was applied by all States without exception, some areas of it were uncertain and controversial and were often invoked and applied by governments just to suit their political interests. States had always been careful to restrict their acceptance of customary law where such fundamental matters as sovereignty over national territory was concerned. An example was provided by the Constitution of Guatemala, which on the question of sovereignty over Guatemalan territory, acknowledged no other limitations of a binding character than those derived from law and treaty.

24. The United Kingdom amendment (A/CONF.39/L.23) had the merit of clarifying the text of the article so as to indicate that its sole and undoubted purpose was to acknowledge the validity of customary international law. Unfortunately, he could not support it because it still left the words " becoming binding " which could make for ambiguity.

25. For all those reasons, he formally proposed the deletion of article 34.

26. Mr. DE CASTRO (Spain) said that the provisions of article 34 were unnecessary in practice. The rule it embodied was not new and was so obvious in its logic as hardly to need stating. The purpose of the article was merely interpretative. Nevertheless, since the Conference had adopted such interpretative articles as 23 *bis* and 77, it might be dangerous to drop article 34. To delete it could give rise to the interpretation *a contrario* that the Conference had denied the effectiveness of rules of customary international law to the extent that they were reflected in treaties.

27. With regard to the various amendments which had been proposed, he thought that it would be extremely dangerous to attempt to make any last-minute changes to the text without the careful attention which the International Law Commission and the Committee of the Whole had been able to give to the article.

28. He was not in favour of deleting the reference to the general principles of law, as proposed by Nepal (A/CONF.39/L.27) and the United Kingdom (A/CONF.39/L.23). Those principles were recognized as a source of international law in Article 38, paragraph 1 (*c*) of the Statute of the International Court of Justice. Furthermore, the words " independently of the treaty " used in the United Kingdom amendment could be interpreted as denying that a treaty could provide evidence of customary international law, or that a treaty, in particular a general multilateral treaty, could serve to consolidate or crystallize the rules of customary international law. The latter point had been stressed by the International Court of Justice in its judgement in the *Northe Sea Continental Shelf* cases.

29. He could accept article 34 as it stood but would like some explanation of the discrepancy between the title of the article, which referred to " rules of general international law " and the text which spoke of " a customary rule of international law ". The fact that the adjective " general " had not been used might perhaps be intended to cover regional or local custom. Possibly the President of the Conference, or the Chairman of the Drafting Committee, could clarify that point.

30. Mr. REDONDO-GOMEZ (Costa Rica) said that his delegation associated itself with the arguments advanced by the representatives of El Salvador, Venezuela and other States against the inclusion of article 34 in the convention. Costa Rica would vote for the deletion of the article.

31. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the debate in the Conference on article 34 reflected the debate that had been taking place among international lawyers for some fifty years, ever since, in 1920, the formula " the general principles of law recognized by civilized nations " had been proposed by the United States jurist Elihu Root in the Advisory Committee of Jurists [8] and had then been included in Article 38, paragraph (3), of the Statute of the Permanent Court of International Justice of the League of Nations.[9]

32. At that time, the peoples of the world were barely beginning their struggle for independence, the colonialist system of exploitation prevailed throughout most of Asia and Africa and the peoples of those continents had been prevented from participating in the establish-

[8] See *Permanent Court of International Justice, Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920,* 15th meeting, p. 331, and annex 1, p. 344.

[9] League of Nations, *Treaty Series,* vol. VI, pp. 403 and 405.

ment of norms of international law, including the Statute of the Permanent Court of International Justice. Thus, the formula " the general principles of law recognized by civilized nations " reflected the unequal position of colonialized peoples; the sources of those general principles were not international treaties or international custom, but the internal law of the European powers, and even Roman law.

33. The old formula had been retained in the Statute of the International Court of Justice, but with one very important addition, for the opening sentence of Article 38 declared that the function of the Court was " to decide in accordance with international law such disputes as are submitted to it ". The introduction of that provision meant that the general principles of law referred to in paragraph 1 (*c*) of Article 38 were deemed to mean principles of international law. To deny that would be tantamount to asserting that the principles concerned were those of the internal law of individual States, since there was either internal law or international law; there was no supranational law which governed both fields.

34. No one could deny the existence of general concepts of law, but their meaning and content varied according to the different juridical systems. The Ukrainian jurist Koretsky, now a judge of the International Court of Justice, had contended that it was " inadmissible to approach concepts from a semantic point of view and to define by ' words ' the legal consequences of concepts, thereby imputing to them a certain content; in other words, it was inadmissible to proceed from the terminology to the principles of law. "[10] That contention had been fully justified during the present Conference, when analogies had been sought between the law of treaties and the internal law of individual States and it had been found that the analogies were often inappropriate. Accordingly, the use of the same terms in different legal systems was no ground for using norms of internal law in international relations.

35. To substitute " general principles of law " for principles of international law would mean giving primacy to principles of the internal law of individual States over such principles as the sovereign equality of States, the right of peoples to self-determination, non-interference in the domestic affairs of other States and other principles. Thus, the Austrian jurist Verdross had stated that the principles in question were recognized neither in international treaties nor in international customary law,[11] and that general principles of law were legal principles which had arisen, not out of international practice, but out of the internal practice of civilized States.[12] It was therefore obvious that to leave such wording in the convention on the law of treaties would open the door for certain States to impose the principles of their legal systems on other States. But that course was incompatible with the sovereignty of the latter States, as a number of representatives had pointed out during the first session. The traditional concept of " general principles of law " was directed against the social changes which were taking place in many countries and in the international sphere.

36. It was therefore important to state clearly in article 34 that the principles concerned were those of international law. That solution would be fully appropriate to the terminology of the convention, which referred either to " internal law ", as in articles 23 ***bis*** and 43, or to " international law ", as in articles 3, 50 and others. It would also help to promote the progressive codification or international law, which involved the elimination of all provisions contrary to the principles of the sovereign equality of States, great and small, irrespective of whether they were situated in Europe or in far distant countries. In the light of those considerations, his delegation would vote for the Mongolian amendment (A/CONF.39/L.20).

37. Mr. DE LA GUARDIA (Argentina) said that, in the Committee of the Whole, his delegation had voted for the amendments by Finland (A/CONF.39/C.1/L.142) and Venezuela (A/CONF.39/C.1/L.223) to delete article 34, in the belief that that provision was out of place in the convention on the law of treaties, whatever its intrinsic value. Since those amendments had been rejected, however, the Argentine delegation had voted for the amendments by Syria (A/CONF.39/C.1/L.106) and Mexico (A/CONF.39/C.1/L.226), because they improved the text.

38. His delegation had not changed its views; after listening to some of the statements made during the debate, it was more convinced than ever that the article was unnecessary, and it would vote for its deletion. If the article were retained, the Argentine delegation would prefer it to be kept as it had been submitted by the Drafting Committee, although it would have no serious objection to the introduction of the phrase as " so far as that rule would be binding upon it ", which was proposed in the United Kingdom amendment (A/CONF.39/L.23). His delegation could not, however, vote for the Mongolian amendment (A/CONF.39/L.20), because it represented a departure from the sources enumerated in Article 38 of the Statute of the International Court of Justice.

39. Mr. SINHA (Nepal) said he withdrew his delegation's amendment (A/CONF.39/L.27), but would ask for a separate vote on the words " or a general principle of law ". A reference to international customary law should be inserted in the title of the article, after the word " binding ".

40. Mr. EUSTATHIADES (Greece) said that his delegation had not attached a great deal of importance to article 34 at the first session, but the debate had shown that a number of representatives were greatly concerned with the question whether or not to retain an article reserving in a special case the rules of general international law.

41. The Greek delegation could not conceive of any

[10] V. M. Koretsky " General Principles of Law " in *International Law*, Kiev, 1957.

[11] A. Verdross, *Völkerrecht*, 1964, p. 147.

[12] See *Recueil d'études sur les sources du droit en l'honneur de François Geny*, vol. III, p. 386.

misinterpretation of the meaning of Section 4, even in the absence of a rule along the lines of article 34; the provisions of that section could not technically be regarded as affecting the basic problem of the sources of international law, and a correct interpretation of the convention would never lead to an attempt to find in the final provision of section 4 a " back-door " method of interfering with international practice and doctrine. The absence of such a provision, therefore, would not be a serious flaw in the convention, and the Greek delegation had not opposed proposals for the deletion of the article. Nevertheless, since the International Law Commission, which naturally considered questions with many implications with greater care than could a large conference, had stated in paragraph (3) of its commentary its reasons for including article 34 in the draft; and since a number of delegations at the second session seemed to attach special importance to the clause, although their interpretations of it differed widely, his delegation would not object to retaining the article. It would, however, prefer the ideas embodied in the United Kingdom and Nepalese amendments to be incorporated in the article.

42. The effect of both those amendments would be to delete from the article a reference to the general principles of law. That would be desirable because article 34 was a reservation, or a safety clause, which drew attention to the contribution of treaties to the formation of international custom and pointed out that the question of that contribution did not apply to Section 4, especially to article 30. In his delegation's opinion, however, general principles of law should not be mentioned in that context, for those principles logically could not arise out of treaties; general principles of law had their own separate existence, were the result of the coincidence of internal legal systems and, as soon as that coincidence ceased, became customary international law. Thus, although a treaty could play a part in the formation of custom, it could not contribute to the establishment of general principles of law.

43. The reference to general principles of law also raised a technical difficulty: in the French and Spanish texts, the last phrase of the article, " *reconnus comme tels* " and " *reconocidos como tales* ", respectively, was in the plural, so that the phrase covered both customary rules of international law and general principles of law, thus obscuring the issue concerning the nature of custom. The United Kingdom amendment would avoid any possible misinterpretations. The Greek delegation would suggest, however, that the word " general " be inserted before the words " international law " in the United Kingdom amendment.

44. Mr. MACAREVICH (Ukrainian Soviet Socialist Republic) said that the role of custom in extending the sphere of application of the effect of treaties beyond the contracting parties was generally recognized in the practice of treaty relations and the doctrine of international law. For example, a treaty concluded between a restricted number of States might formulate norms or establish a régime for a territory, river or lake which other States would gradually recognize as binding on them on the basis of custom. When that problem had been discussed during the first session, the Ukrainian delegation had voted against the proposals to delete article 34, and had voted for the Syrian amendment (A/CONF.39/C.1/L.106), which had clarified the text, and for the Mexican amendment (A/CONF.39/C.1/L.226) to add the words " or as a general principle of law " at the end of the article.

45. His delegation now wished to support the Mongolian amendment (A/CONF.39/L.20), the purpose of which was to make clear that " general principles of law " were to be understood as principles of international law. That amendment was entirely logical, for the Conference itself was concerned with the law of treaties as a branch of international law, and could not base itself on principles of the internal law of individual States. The Ukrainian delegation could not agree with the Argentine representative that the Mongolian amendment was not in keeping with Article 38 of the Statute of the International Court of Justice, since the opening clause of that article stated that the function of the Court was to decide, in accordance with international law, such disputes as were submitted to it; the " general principles of law " referred to in paragraph 1 (*c*) must therefore be understood to mean general principles of international law.

46. Mr. RUEGGER (Switzerland) said he wondered if it was really necessary for the Conference to divide itself sharply over article 34. At the first session his delegation had voted for the proposals by Finland (A/CONF.39/C.1/L.142) and Venezuela (A/CONF.39/L.223) to delete the article. However, since then it had been considerably improved by the Drafting Committee; in particular the title now added to it had made clear many points that could have given rise to doubt.

47. His delegation did not share the fears expressed by many regarding the references to customary law and to general principles of law. He did not believe there was any danger that through the adoption of the article there could be illicit extension of customary law. Whatever the Conference decided, custom would remain in the background in comparison with specific texts. That principle had been formulated in the preamble to the earliest convention codifying international law.

48. Nor did Switzerland share the misgivings expressed by some concerning the possibility that the reference to a general principle of law could be understood to relate to internal law, since the title made the meaning perfectly clear; it was also clear from Article 38 of the Statute of the International Court of Justice.

49. Switzerland was therefore prepared to vote for the text of article 34 as proposed by the Drafting Committee. Nevertheless, he recognized the practical wisdom of the United Kingdom proposal (A/CONF.39/L.23). That proposal made it clear that article 34 should be regarded merely as a safeguarding clause, and it seemed likely to meet many of the objections that had been raised. The Swiss delegation would therefore be prepared to accept the United Kingdom amendment, although he would like to suggest that the wording should be amended by deleting the words " becoming " and " upon ", so

that it would read " Nothing in articles 30 to 33 precludes a rule set forth in a treaty from binding a third State . . . ", since the rule would exist already for the third State. He agreed with the representative of Greece that the reference should be to general international law instead of to international law.

50. Sir Francis VALLAT (United Kingdom) said that he wished to withdraw his delegation's amendment (A/CONF.39/L.23), though with some regret, because it was clear that it could not gain a sufficient majority. His delegation was second to none in its admiration of the Statute of the International Court of Justice and respect for Article 38 of the Statute; in fact the United Kingdom believed that its amendment more accurately reflected the content of that Article.

51. It was important to note that in Article 38 of the Statute the first paragraph contained the words " in accordance with international law ", and that the succeeding paragraphs were subsidiary paragraphs. The United Kingdom amendment had used the wording of that Article of the Statute of the International Court of Justice; the problem with article 34 of the draft convention was that the words " a general principle of law " had created unnecessary difficulty. The United Kingdom would accordingly vote against those words; moreover, since it believed that if they were included, the article would introduce confusion into the convention, his delegation would vote against the article if those words were retained.

52. It also considered that the introduction of the word " international ", as suggested by Mongolia, would be a further departure from Article 38 of the Statute of the Court, and would vote against it.

53. The PRESIDENT said that some confusion seemed to have arisen in the discussion between two distinct ideas. The first was the notion that a certain obligation in a rule of a treaty could at the same time be an obligation deriving from a general principle of law, or from customary law, and that consequently it was binding on a third State. He did not believe that that was the notion the International Law Commission had had in mind when it had proposed the article. In his view, the article related to the quite different possibility that a rule originally embodied only in a treaty might subsequently, in the course of time, as one treaty followed another and other developments took place, become a rule of customary law, and that as a consequence a third State might later become bound by that customary rule which had had its first origins in a treaty. The correctness of that interpretation seemed clear from the wording of the title of the article, which referred to " Rules set forth in a treaty becoming binding on third States as rules of general international law ".

54. In the light of that interpretation, the whole problem of a general principle of law became less important, since a rule first established in a treaty might become a customary rule, but it could hardly become a general principle of law in the sense of Article 38 of the Statute of the International Court of Justice.

55. In accordance with the request by the representative of Nepal, he invited the Conference to vote separately on the words " or a general principle of law ".

56. Mr. CARMONA (Venezuela), supported by Mr. VEROSTA (Austria), said he thought a vote should first be taken on the question whether or not article 34 should be deleted.

57. The PRESIDENT said that the Conference was bound by rule 41 of its rules of procedure, which provided that amendments must be voted on before the proposal to which they related.

The words " or a general principle of law " were rejected by 50 votes to 27, with 19 abstentions.

58. The PRESIDENT said that, as a result of that vote, the amendment by Mongolia (A/CONF.39/L.20), which related to the words now deleted, must fall. He would accordingly invite the Conference to vote on article 34 as a whole, as thus amended.

Article 34 as a whole, as amended, was adopted by 83 votes to 13, with 7 abstentions.

59. Mr. HAYTA (Turkey) said that his delegation had abstained from voting both on the amendment to article 34 and on the article itself, for the reasons set forth in the Turkish delegation's statement at the 36th meeting of the Committee of the Whole.

60. Mr. TALALAEV (Union of Soviet Socialist Republics) said that his delegation had voted for article 34 on the understanding that a rule set forth in a treaty could become binding on a third State as a customary rule if the third State recognized that rule and accepted it as binding.

61. Mr. CARMONA (Venezuela) said that, on the express instructions of his Government, he must reserve its position in advance with respect to article 34. Venezuela could not accept the idea of a customary rule of international law becoming binding upon a third State, as provided in the article, except in so far as the State concerned had recognized and accepted such a rule.

62. Mr. BILOA TANG (Cameroon) said that the President's statement had confirmed his understanding of the intentions of the International Law Commission concerning article 34. His Government would formulate reservations regarding article 34, and he wished to associate himself with the statement by the Soviet Union representative as to the necessity of acceptance of the obligation by the third State concerned.

63. Mr. BADEN-SEMPER (Trinidad and Tobago) said that his delegation had voted for article 34. However, he assumed that the article would be referred back to the Drafting Committee, since it was necessary to make corresponding changes in the title to include a reference to " customary international law ". The delegation of Trinidad and Tobago would prefer the reference in the text to be to " a rule of customary international law " instead of to " a customary rule of international law ", and similar wording should be used in the title.

64. The PRESIDENT said that the Drafting Committee would take note of the suggestion by the representative of Trinidad and Tobago.

65. Mr. REDONDO-GOMEZ (Costa Rica) said that Costa Rica, like other Latin American countries, formed part of a legal system that was more developed than many rules of international law and he must state, with regret, that in any conflict that might arise between a customary rule of international law and the principles of inter-American law, Costa Rica could not accept the authority of the former.

66. Mr. SHUKRI (Syria) said that he had understood the representative of Nepal to have confined his amendment to the deletion of the words " or a general principle of law ", and had not intended also to delete the words " recognized as such ".

67. The PRESIDENT said that was also his understanding.

The meeting rose at 5.20 p. m.

SIXTEENTH PLENARY MEETING

Thursday, 8 May 1969, at 10.50 a.m.

President: Mr. TABIBI (Afghanistan)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

1. The PRESIDENT invited the Conference to continue its consideration of the articles approved by the Committee of the Whole.

Article 35 [1]

General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Article 35 was adopted by 86 votes to none.

Article 36 [2]

Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

(*a*) The decision as to the action to be taken in regard to such proposal;

(*b*) The negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; and article 26, paragraph 4 (*b*), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(*a*) Be considered as a party to the treaty as amended; and

(*b*) Be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 36 was adopted by 91 votes to none.

Article 37 [3]

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) The possibility of such a modification is provided for by the treaty; or

(*b*) The modification in question is not prohibited by the treaty and:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Article 37 was adopted by 91 votes to none.

2. The PRESIDENT said that the Committee of the Whole had decided at the first session to delete article 38.[4] He therefore suggested that the Conference take up articles 39 to 42, forming Section 1 of Part V.

Statement by the Chairman of the Drafting Committee on articles 39-42

3. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had circulated a document (A/CONF.39/L.28) containing a communication from the Expert Consultant with regard to articles 41 and 42.

4. Before taking up Part V, the Drafting Committee

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[1] For the discussion of article 35 in the Committee of the Whole, see 36th, 37th and 78th meetings.

[2] For the discussion of article 36 in the Committee of the Whole, see 36th, 37th, 86th and 91st meetings.

[3] For the discussion of article 37 in the Committee of the Whole, see 37th, 86th and 91st meetings.

[4] See 38th meeting of the Committee of the Whole, para. 60.